FILE COPY

FIL
NOV
CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1934

No. 296

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

—against—

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FILED BY GABRIEL KOTCHER, ATTORNEY AT LAW, AS AMICUS CURIAE IN BEHALF OF THE INDEPENDENT MILK DEALERS OF BROOKLYN AND NEW YORK AND INDEPENDENT PRODUCERS OF THE STATE OF NEW YORK

GABRIEL KOTCHER,
Counsel for the Independent Milk Dealers of Brooklyn and New York and Independent Producers of the State of New York.

EZRA B. KOTCHER,
Of Counsel.

HIGGINS & HIGGINS, INC., PRINTERS, 48 NEW CHAMBERS ST., N. Y.

INDEX

Subject Index

PAGE

Brief Filed by Gabriel Kotcher, Attorney at Law, as *Amicus Curiae* in Behalf of the Independent Milk Dealers of Brooklyn and New York and Independent Producers of the State of New York 1

Opinion Below 2

The Statute Involved 2

Statement 2

As to the One Cent Differential of 1934 8

Argument 3

Point I—The classification bears a fair and substantial relation to the objects and purposes that the legislature sought to accomplish 3

1. History of the Statute Involved, and Its Relation to the Purposes of the Milk Control Act 3

2. The Provision for the One Cent Differential is not Arbitrary, Discriminatory, nor Unreasonable 9

3. There is a Reasonable Basis for the Classification 9

4. The Public Regards the Advertised Brands as Being Impressed with a Special Characteristic 12

5. The One Cent Differential is an Integral Part of the Entire Law and Carries Out the Purposes Thereof 14

PAGE

Conclusion 26

Addenda 28

TABLE OF CASES CITED

American Sugar Refining Co. vs. *Louisiana*, 179 U. S. 89 25

Continental Baking Co. vs. *Woodring*, 286 U. S. 352 18

Home Building and Loan Assoc. vs. *Blaisdell*, cited in United States Supreme Court on January 8th, 1934..... 21

Liggett Co. vs. *Lee*, 288 U. S. 585, 586, 587 .....13, 14, 17, 23

Miller vs. *Wilson*, 236 U. S. 373 20

Nebbia vs. *New York*, decided by United States Supreme Court, March 5, 1934....22, 24

Rast vs. *Van Deman & Lewis*, 240 U. S. 342 .....16, 22, 23

Royster Guano Co. vs. *Virginia* 17

Standard Oil Company vs. *Tennessee*, 217 U. S. 413 19

State Board of Tax Commissioners vs. *Jackson*, 283 U. S. 527.....16, 23, 24

Whitney vs. *California*, 274 U. S. 357, 369.... 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1934.

No. 296

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

—against—

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FILED BY GABRIEL KOTCHER, ATTORNEY AT LAW, AS AMICUS CURIAE IN BEHALF OF THE INDEPENDENT MILK DEALERS OF BROOKLYN AND NEW YORK AND INDEPENDENT PRODUCERS OF THE STATE OF NEW YORK

Opinion Below

The opinion of the United States District Court for Southern District of New York is Reported in 7 Fed. Supp. 352.

The Statute Involved

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York of 1934.

The appellant questions the validity of Section 258-q of Article 21-A.

Statement

The action was commenced pursuant to Section 266 of the Judicial Code (Title 28 U. S. Code, Sec. 280) by an application for an interlocutory injunction. The case was heard on such application by a statutory court of three judges. The relief prayed for was denied and the complaint dismissed on the merits. Probable jurisdiction was found by this Court on October 8, 1934.

The sole issue involved in this case is the validity under the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the United States Constitution, of that part of Section 258-q of Article 21-A of the Agriculture and Markets Law, which permits dealers in milk not having a well advertised trade name to sell their product in the City of New York to stores and by stores to the consumers at a price one cent less than the price to be charged by dealers in milk of a well advertised trade name.

ARGUMENT

POINT I

The classification bears a fair and substantial relation to the objects and purposes that the legislature sought to accomplish.

1. History of the Statute Involved, and Its Relation to the Purposes of the Milk Control Act.

On March 10th, 1932, owing to the existing emergency in the milk industry, a joint Legislative Committee of the New York Legislature was appointed by joint resolution for the purpose of investigating the milk industry of this State, and the resolution stating the principle objective declares, "to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer."

After a preliminary report by this Committee, the Pitcher Bill was introduced, and a joint hearing on this milk control legislation was held before the Senate and Assembly Committees on Agriculture on March 14th, 1933. The hearing lasted from the early afternoon until late that night. There was a general feeling that the proposed bill would not fulfill the objectives. At this point, a resolution was offered from the floor by Mr. Sisson to the effect that representa-

tives of the industry itself should meet and try to work out a workable bill agreeable to all (p. 276—Joint Legislative Hearing held at Albany, March 14th, 1933). The Sisson resolution was adopted and a Committee consisting of the various groups was chosen, including Borden's Farm Products Co., Inc., Sheffield Farms, Inc., and Dairymen's League sitting in as an observer. The Committee commenced its work the following morning in the room of the Agricultural Committee. This representative committee went over the Pitcher Bill section by section. Upon reaching the causes for revocation of license the independent dealers and producers proposed a one cent differential substantially as it now exists. The advertised group opposed this. The work of the Committee proceeded with the understanding that a possible agreement might be reached at the close of the work. Upon the conclusion of its work, the independent dealers and producers again recommended the adoption of a 1c differential between the well advertised and unadvertised brands of milk. The representatives of Borden's, Sheffield Farms, Sheffield Producers and Dairymen's League vigorously opposed this differential. The representatives of the independent dealers and farmers contended that a 1c differential per quart to stores in bottles and from stores to consumers was customary between well advertised and unadvertised brands of milk and that if no such differential were continued, the sales of the independent dealers would drop to such an extent that their business would become unprofit-

able, and they would be forced out of business. The independent dealers also showed that although they sold their milk 1c below the well advertised brands, yet, their returns to the farmers were higher than those paid by Borden's and Dairymen's League, and generally as high, if not higher, than Sheffield Farms returned to the Sheffield Producers. It was also urged for the independent farmers that while the law was intended for the welfare and benefit of all the farmers, the effect of the omission of the price differential in the bill would leave more than half or about fifty thousand independent farmers unprotected and without a market for the sale of their milk. That the proposed milk laws would afford them no relief and would result in even greater distress to them. Some members of the Legislature also urged that the public interest required a reasonable degree of competition, for the independent dealers claimed that they could afford to sell for 1c less, and return the producer more than the dealers of the well advertised brands due to their lower overhead. It was also pointed out that the dealers of the well advertised brands were conducting a campaign of disparaging, invidious and alarming advertising matter under such slogans as:

> You can wash vegetables, but can't wash milk;
>
> That independent dealers were selling the same milk in bottles as they had theretofore sold in cans;
>
> That there was mystery in the milk of independent dealers,

and such other alienating advertising matter.

These hearings lasted for about two days during which it was further shown by the independent dealers and farmers that a uniform price would put the independent dealers out of business before the emergency was over; that the independent dealers would lose the market for the sale of their milk; that the independent producer would consequently lose the outlet for his milk in the class 1 bracket which is used for fluid purposes and brings the highest price, and that the producers selling to the well advertised dealers would enjoy an increase of market; that one group of farmers and dealers would gain an advantage over another, and that the effect of it all would be the creation of a monopoly for the well advertised brands.

However, the dealers of the well advertised brands would not yield. It was then agreed by the various representatives that the representative committee hand in to the Agricultural Committee the agreed proposed bill, and that the independents hand in their recommendation for a 1c differential. This was accordingly done by the independents, and they handed in a 1c differential which was substantially the same as subdivision c of section 317 of the Milk Laws of 1933 as subsequently enacted.

The Agricultural Committee thereafter reported out the Pitcher Bill with subdivision c of section 317 of the Laws of 1933 included. It will be observed that it was not the cost of advertising that the Legislature considered but it was the relation that the differential bore to the

whole plan of improving the condition of all of the farmers of the State, and likewise protecting the independent dealer, the independent producer and consumer. This one cent differential was the king-pin intended to hold the milk legislation in equilibrium and just balance.

It was submitted that, the big companies engaged, primarily, in *retail* house to house trade, were to receive a definite price for their milk, so delivered, and the independent dealers were permitted to retain their *wholesale* market for their unknown brands of milk on a competitive and reasonable basis.

It was also submitted that where the sales involved loose milk in 40 quart cans (where loose milk may still be sold in hotels and restaurants) no price differential was necessary for the product reached the consumer under no trade-name.

This section was adopted for the purpose of continuing during the emergency the custom of the one cent differential with the object of maintaining the *status quo* in the industry as it existed in normal times, for the benefit of all concerned. If this keystone provision of the bill were omitted, the entire milk legislation would have failed of its purpose. It was only after days of discussion, argument, examination of relevant facts and deliberation that the Legislature enacted subdivision c of section 317 of the Laws of 1923. It was not merely subsequently amended in that respect as claimed by the complainant. No minutes were taken at

this representative hearing, but the writer as well as W. H. Marcussen, who has submitted an affidavit on behalf of plaintiff, were members of the Committee.

As to the One Cent Differential of 1934

After the Pitcher Bill of 1934 was proposed, a joint hearing was held before the Senate and Assembly Committees of Agriculture on March 23rd, 1934. Senator Byrnes presiding, expressed the purpose of the hearing

> "that we may have a bill that will accommodate itself to the emergency and to the exigencies and to the end that every producer, every consumer and every dealer * * * * will have had full and fair play by the Legislature."

(Minutes of legislative hearing of 1934, p. 2, l. 21, et seq.). Throughout the hearing, various speakers pointed out to the Committees the importance and necessity of section 258q as it related to the entire milk law plan.

At the discussion before this Joint Legislative Committee, Mr. A. C. Pilger a producer, said:

> "In regard to this advertised brand business, we are very much interested. I believe that any farmer, if he knows his business is going to take an interest in the consumer and distributor as well as the producer. It is necessary to see the

whole picture to form a concrete conclusion'' (p. 178, lines 14-19 of the Legislative hearing, 1934).

It is obvious therefore that this one cent price differential is a coordinate part of a broad scheme of relieving the producer, of maintaining a fair price structure for the consumer and of preserving the independent dealer during the emergency.

2. The Provision for the One Cent Differential is not Arbitrary, Discriminatory, nor Unreasonable.

Plaintiff complains that only a few large companies have been singled out and the law is therefore unreasonable.

This contention cannot be sustained since the law does not single out any company but includes all that come within the definition of the statute. What is a well advertised brand is always a question of fact to be determined by the Division of Milk Control. The law exempts no one. Any dealer who attains a similar position will be similarly classified. The law does not single out a few, but all who as a matter of fact are found to be well advertised.

3. There is a Reasonable Basis for the Classification.

There are apparent and obvious differences between the dealers in advertised brands of milk and those dealing in unadvertised brands of milk.

There is a difference and distinction of character, structure, methods of doing business, outlook, power and influence between the complainant and the dealers not having a well advertised trade name or independents as they are commonly called. It is not alone the advertising that distinguishes the complainant from the independents, but the difference is reflected in the advertising itself. The advertising is an apparent effect of the contrariety. The advertising designates rather than describes the class. The independent dealer is limited and confined to a local area; the complainant operates on a national and even international scale.

The complainant sells its products under registered trade names; the independents do not. When the complainant advertises in one area the advertising may also bear fruit in other areas of its operations. The complainant and the other well advertised firms are component parts of a group of companies owned by a common parent. These component parts lend flexibility and adaptability to the operations. While for instance the complainant is limited to well advertised brands its affiliate, Reid's Union Dairy, can and does properly operate as an unadvertised dealer in the milk business and as an advertised dealer in the ice cream business. The Sheffield Farms Co. has its sister company, the Muller Dairies and it operates as an unadvertised milk dealer. The Dairyman's League has its Sacks Dairy Co., Delancey Dairy Co., Beakes Dairy Co. and others operating as unadvertised dealers in milk.

The independent dealer generally sells only fluid milk and cream. The complainant not only sells fluid milk and cream but has a chain of grocery stores selling groceries and other food products. The complainant and its parent company also deal in cheese, condensed and evaporated milk, sour cream, milk sugar, powdered and malted milk, washing powder, poultry feed, caseine and other milk and related products. The complainant has a long range planning outlook. It often enters a field of endeavor at a loss for the purpose of eliminating competition or enticing business. It controls the price structure of a market by shipping the surplus of one market to demoralize or control the price structure of another. The power of the complainant and the other dealers of the well advertised brands is enormous in wealth and influence. The Dairymen's League has received millions of dollars in loans from the Federal Government. The financial structure of the complainant is different. The complainant's stocks are held by the parent company whose stocks are sold on the exchange. The complainant is advertised by newspaper, magazine, propaganda editorial, billboard, electric sign, school (by means of screens the schools show how milk is handled "by courtesy of" either complainant or Sheffield's Farms). In school books (showing how milk is transported, trucks are shown bearing names of the complainant) and on radio from morning till late at night the products of the complainant are exalted and extolled. All these characteristics and distinctions do not attach to the independent dealers.

There is also an enormous difference in size as well as in structure and method of doing business between the complainant and the independent dealers. The complainant states the well advertised group take the outlet of 42,000 milk producers while the hundreds of independent dealers take the outlet of about 50,000 milk producers.

4. The Public Regards the Advertised Brands as Being Impressed with a Special Characteristic.

By reason of these well known facts the product of the well advertised dealers have come to be regarded by the general public as being impressed with a characteristic of different quality, and to be regarded as worth more money than the unadvertised brands. The well advertised brands therefore enjoy a preference when placed side by side with unknown brands.

The legislature recognized the fact that in order to continue the sale of the products of 50,000 independent producers a continuance of the competitive price would be necessary to meet the preference for the advertised brands of milk. Where the product reached the consumer under no well advertised brand such as loose milk, no differential was established.

With respect to City Market, there are really two industries, the retail and the wholesale store industry. The complainant caters principally to house to house trade while nearly all the independents engage only in the store business. The well advertised brands run according to

city records about 4,500 retail wagons and their agents keep contact with the city populace and each agent is a company booster. While the hundreds of independents operate only about 300.

The retail trade is more than 90 per cent in the hands of the well advertised brands. The differential between the house to house trade and the unadvertised brands in the stores was prior to the enactment of the milk laws at least 2 cents per quart. For that reason the legislature obviously found no reason for disturbing the price differential in house to house trade between well advertised brands and unadvertised brands. The Legislature continued the *status quo*. The legislature found that these differences required classification.

> "We must know why the discrimination is desired, to what end it is directed and the relation between end and means. If the motive is vindictiveness, ensuing in mere oppression, the result may be one thing. If the motive and the end attained are the advancement of the public good, the result may be quite another, unless preference and repression go so far as to outrun the bounds of reason."
>
> *Liggett Co.* vs. *Lee,* 288 U. S. at p. 585.

> "Slender though the difference of organization is, it is real enough to rescue classification from the reproach of an arbitrary preference."
>
> *Liggett Co.* vs. *Lee, supra,* at p. 585.

> "There is a presumption that the legislature did not classify * * * without study of the relevant data or without an informed and considered judgment. Its findings are not subject to annulment by a court unless facts within the range of judicial notice point to them as wrong."
>
> *Liggett Co.* vs. *Lee, supra,* at p. 586.

The Legislature has wide discretionary powers to classify those engaged in the same industry.

> " * * the equal protection clause does not take from a state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary * * *."
>
> *Whitney* vs. *California,* 274 U. S. 357, 369.

5. The One Cent Differential is an Integral Part of the Entire Law and Carries Out the Purposes Thereof.

This provision of the statute is a coordinate part of the broad scheme of the entire law and is inextricably connected with purposes and objects for which it was enacted.

Prior to the enactment of the ordinance prohibiting the sale of loose milk in the City of

New York, the products of the independent producer were sold primarily through the stores. The well known brands of milk were sold primarily in house to house trade. With the advent of bottled milk in the stores it became impossible to sell an unknown brand of milk for the same price as that charged for the well known. Manifestly a price balance was and is necessary. Otherwise the product of the independent producer can find no market, except that of manufacturing which realizes a very low price. It was clearly pointed out to the Committee that in order to preserve the market of the independent producers, it would be necessary to maintain a price differential between the known and unknown brands of milk.

The Legislature recognized the fact that in order to continue the sale of the products of fifty thousand independent producers, a competitive price would be necessary in order to meet the preference for advertised brands of milk.

The price differential weighed in favor of the unadvertised brand so as to balance and equalize the possible sales demand. The limitation of the price differential was for the purpose of avoiding unfair trade practices so that the unknown brand could not create a price war.

The Legislature also sought to avoid unfair trade practices, and sought to avoid price wars. It therefore set a limit of 1c for this competitive price differential. This limit is not arbitrary. The differential may be less than 1c, but it cannot be more. The Legislature determined that the producers were to receive a definite

price for their milk, the big companies engaged in *retail* house to house trade were to receive a definite price for their milk, and the independent distributors were permitted to retain their *wholesale* market for their unknown brands of milk on a competitive and reasonable basis, and thus maintain a market for the independent producers and dealers. These considerations bear a reasonable relation to the purposes of the statute, which seeks to afford relief to all engaged in the industry and permits no new advantages to any.

Such classification is proper if any reasonable state of facts can be conceived to sustain it. *State Board of Tax Commissioners* vs. *Jackson*, 283 U. S. 527.

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction * * * or if any state of facts reasonably can be conceived to sustain it."

In *Rast* vs. *Van Deman & Lewis*, 240 U. S. 342, a Florida statute placed a different rate of tax on stores issuing profit sharing coupons than on other stores. The lower Court held that the giving of such coupons was a legitimate means of advertising and held the statute unconstitutional. The Supreme Court reversed the Court below and sustained the law. The Court said:

> "The difference between a business where coupons are used, even regarding their use as a means of advertising and a business where they are not used is pronounced. * * * It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed" (p. 357).

The Court should sustain the classification when there is a difference between the classes, but the difference need not be great. The Court held further in the above case:

> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

In determining whether or not there is any relation between the classification and the purposes of the enactment, the Court should consider the state of facts existing at the time the law was passed, the facts which the Legislature considered, and the purpose of the legislation. *Royster Guano Co.* vs. *Virginia, supra; Liggett* vs. *Lee, supra.*

The Minutes of the Legislative meetings are submitted herewith, and some of the relevant excerpts therefrom are annexed hereto. It clearly appears therefrom that the Legislature con-

sidered the various arguments for and against the price differential. It also appears therefrom that such enactment was a necessary part of the act, and that without it, producers, distributors, and consumers would suffer. The public welfare during the emergency required it. It also appears therefrom that the pertinent subdivision herein attacked, was a necessary means of accomplishing the purposes of the entire law. The minutes also show that the legislature properly exercised its discretion.

This subdivision represents in the law that which had been already existing as a common trade practice. The classification was made in accordance with the conditions prevailing. The law does not change the basis of the business as hitherto practiced. The Legislature has classified according to general considerations, and with a distinct regard to customs, usages, policy and prevailing conditions.

It was the duty of the Legislature to consider the propriety of the classification from the practical necessities of the situation. This has been held a proper basis of classification.

In *Continental Baking Co.* vs. *Woodring*, 286 U. S. 352, the State statute regulated motor vehicles and taxed them on the mileage basis. The Statute did not pertain to motor vehicles which had their base in cities and operated within a radius of twenty-five miles of such city, or to the transportation of farm products to the market by the owner of the products. The plaintiff was a baking company making

deliveries in its own trucks. The Court held the law was valid since the distinctions made in the statute were made necessary for practical reasons and for convenience. The Court said:

> "The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity" (p. 371).
>
> "The Court (below) properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference * * *" (pp. 372, 373).

In *Standard Oil Company* vs. *Tennessee,* 217 U. S. 413, the anti-trust statute of Tennessee provided for different modes of enforcement as against corporations and individuals and for this reason was attacked as invalid.

The statute was sustained and the Court stated.

> "The foregoing argument is one * * * to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."

The classification made in the present statute is one that merely recognizes an existing prac-

tical and necessary business practice, and such classification is proper.

In *Miller* vs. *Wilson*, 236 U. S. 373, a statute limiting the hours of labor of women but excepting certain industries was attacked as invalid, for this reason, but was upheld. The Court said:

> "The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise there would be no legislative power to classify. For it is always possible by analysis to discover inequalities as to the same persons or things embraced within any specified class • • •" (p. 382).

The Legislature recognized the fact that in order to aid the producers, it was necessary to protect the market of the producer. It also recognized the fact that the existence of the market was dependent upon a competitive price. The protection of the market of fifty percent of the producers goes to the very basis of the purposes of the law.

Another purpose of the law was to prevent unfair trade practices consisting of constant, extensive price cutting. The Legislature therefore, provided for the limitation of price cutting. While it recognized the fact that unadvertised brands would have to continue to undersell the advertised brands, it set a limit of 1c in the stores. In other words, they might

very well undersell to the limit of one cent, but the advantage given was to provide a favorable balance of price so that the two articles would *have an equal prospect of sale.*

The classification in view of the emergency was fair and reasonable. The law here enacted was passed in aid of the farmer and for the public welfare during the period of an emergency, and the emergency gave rise to the necessity for the classification.

In *Home Building and Loan Assoc.* vs. *Blaisdell,* cited in the United States Supreme Court on January 8th, 1934, the Court said:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. *Wilson* vs. *New,* 243 U. S. 322."
>
> "The constitutional question presented in the light of the emergency is whether the power possessed embraces the particular exercise of it in response to a particular condition."
>
> "It is manifest from the review of our decisions, that there has been a growing appreciation of public needs and of the necessity of finding grounds for a rational compromise between independ-

> ent rights and public welfare * * * * and the question is * * * * the use of reasonable means to safeguard the economic structure upon which the good of all depends."
>
> "This power which in its ramification is known as the police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

The Legislature found that an emergency existed in the dairy industry and sought means of protecting the farmer and the general public. It found necessarily that to accomplish this purpose, a classification of the dealers was necessary.

In *Rast* vs. *Van Deman & Lewis,* 240 U. S. 342, the Court held:

> "It makes no difference that the facts may be disputed or their effect opposed by argument or opinions of serious strength. It is not the competency of the courts to arbitrate in such contrarity."

In *Nebbia* vs. *New York,* decided by United States Supreme Court, March 5, 1934, the Court held further:

> "It results that a regulation valid for one sort of business, or in a given cir-

> cumstance may be invalid for another sort or for the same business under other circumstances because the reasonableness of each regulation depends upon the revelant facts."
>
> "Laws passed to secure fair trade practices have been found consistent with due process."

In *Rast* vs. *Van Deman & Lewis, supra,* the Court further held:

> "It is the duty and function of the legislature to discover and correct evils, and by evils we do not mean some definite injury, but obstacles to greater public welfare. And we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary'."

It has been held that the method and the nature of doing business is a sufficient basis for a classification.

In *Liggett* vs. *Lee,* 288 U. S. 517, citing with approval *State Board of Tax Commissioners* vs. *Jackson,* 283 U. S. 527, the Court said:

> "It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or department store, the former employ distinguishable methods of conducting bus-

> iness, and the legislature may make the difference in method and character of business the basis of classification for taxation."

In *State Board of Tax Commissioners* vs. *Jackson, supra,* the statute attacked, raised the question similar to the one raised in this case. The statute imposed a tax upon chain stores at a higher rate than upon individual stores. Proof was presented that there were "many points of difference" between chain stores and independently owned units. A similar situation exists in the instant case. The Supreme Court held:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction * * * or if any state of facts reasonably can be conceived to sustain it."
>
> "If the selection or classification is neither capricious nor arbitrary and rests upon some reasonable consideration of difference or policy there is no denial of the equal protection of the law."
>
> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

In *Nebbia* vs. *New York, supra,* the Court held, in speaking of dealers and storekeepers

who sold the same product, that the Milk Control Law was not on its face arbitrary or unreasonable

> "for there are obvious distinctions between the two classes of merchants which may well justify a difference of treatment. * * *"

In *American Sugar Refining Co.* vs. *Louisiana* 179, U. S. 89, the statute attacked levied a tax on all persons refining sugar and molasses, but exempting therefrom planters and farmers grinding and refining their own molasses and sugar. The Court held:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination if founded upon a reasonable distinction in principle is valid."

In the same case, the Court cited with approval, and stated:

> "In *Pacific Express Co.* vs. *Seibert,* 142 U. S. 339, a state statute defining an express company to be such as carried on the business of transportation under contracts for hire with railroad and steam boat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matters in vehicles of their own."

The foregoing authorities clearly indicate that

the Legislature in its discretion, has power to make such classification in industries as effectuate the purpose of their enactment. Particularly, this power may be exercised during an emergency.

The emergency in the dairy industry gave rise to the necessity for the enactment of the entire law. It likewise gave rise to the necessity of the classification in order that the purposes of the entire law may be effectuated.

CONCLUSION.

The one cent price differential bears a direct relation to the price fixing structure. It is inextricably connected with the objects and purposes of the law, and is a coordinate part of the whole plan. The legislature informed itself of the custom and usage of the city business. It knew that the unadvertised brands were selling and could sell only at one cent a quart less than the well advertised brands. It continued a custom that preserves the independent dealer so that the independent milk producer would not have the outlet for his milk destroyed. The statute was designed for the relief of all the farmers. Without the one cent differential no relief would have been afforded the independent producer. It also took into consideration the interests of the city consumer and guarded the general welfare of the public. The omission of this provision would have thrown all the business into the hands of the well advertised brands and monopoly would have resulted. The provision attacked herein was de-

signed to preserve the independent dealer, the 50,000 independent producers and to promote the public health and general welfare. The legislature acted from lawful motives and its act should not be annulled as arbitrary (see minutes of joint hearings and the excerpts of the minutes hereto annexed).

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be affirmed.

GABRIEL KOTCHER,
Counsel for the Independent Milk Dealers of Brooklyn and New York and Independent Producers of the State of New York,
No. 29 Broadway,
New York City.

EZRA B. KOTCHER,
Of Counsel.

ADDENDA

EXHIBIT A

JOINT HEARING
before the
Senate Committee on Agriculture
and the
Assembly Committee on Agriculture

Hearing on Milk Control Legislature

March 23, 1934

Statement by Assemblyman Maurice A. Fitzgerald
(Page 47 of Hearing)

Assemblyman Maurice A. Fitzgerald, of the Fifth Queens County District is desirous of being heard at this time. We will be pleased to hear from Assemblyman Fitzgerald.

ASSEMBLYMAN FITZGERALD: Mr. Chairman, and Gentlemen of the Committees, the Pitcher-Bartholomew Bill by leaving out section 317-C of the Laws of 1933 will in my opinion, increase the cost of milk distributed by independent dealers and sold through retail stores to consumers in the City of New York by one cent per quart. There are approximately 1,600,000 quarts of such milk sold daily through these stores in New York City. If the Pitcher-Bartholomew Bill is adopted in its present form the increase in the cost of milk to the consumer in New York City will be $16,000 per day, or almost $6,000,000 per year.

Since the well-off citizens usually have their milk delivered to their homes it will be readily seen that in the main the milk sold through the retail store is consumed by the poor. While there might be some slight justification of such a mulcting of the consumers of New York City if this huge sum was paid to the farmers, such is not the case. This extra money does not go to the farmer. It must be paid to the independent dealer distributor who is already paying milk control board prices to the farmer, and this in spite of the fact that the independent dealer is not asking for this increase. If the Pitcher-Bartholomew bill is to be adopted at all it should be amended by adding a provision such as that contained in the present law which authorizes the independent dealer to sell milk to the retail stores at a price one cent below the price fixed for advertised brands.

Thank you.

CHAIRMAN BYRNE: Thank you, Assemblyman Fitzgerald.

Statement by Mr. Stanley Piseck, President of the New York Milk Producers Federation
(Page 54 of Hearing)

• • • • • • • •

One nation-wide distributor has met all fixed expense. He has met his dividends. On top of that he could pay his officer $108,350 as a salary. Now, another nation-wide organization paid its president in 1929, our boom year, $109,332; in 1932, a depression year, that salary was raised

to $171,099. Another officer in that organization has over $100,000 as a salary. Any one of these three men has received more than the 100,000 dairy men producing in the metropolitan area.

One of those men got more than the entire industry. That is something to look at.

We had that department, and I will say when these same practices were started in the middle west they were stopped by that department, and they as pioneers have given us price fixing and enforced it. Now we don't expect to come here and preach to you that this milk control board is unnecessary. It is very necessary, but on the other hand I hope that not only our commissioner, but the Council of Farms and Markets prick upon this. They have been stagnant. They have been motionless. They haven't prepared these men against these mergers.

Now these things we have got to contend with. It is possible with these nation-wide dairy organizations to demoralize any market.

Statement by Mr. Felix Piseck
(Page 77 of Hearing)

* * * * * * * *

MR. PISECK: It is necessary—there is a suggestion I would like to add to the bill—it is necessary for one cent differential on advertised and non-advertised brands of milk. If that isn't included it endangers the small independent dealer.

Statement by Mr. E. F. Cook
(Page 106 of Hearing)

• • • • • • • •

As I have said, on page 27, line 26, after "period" I would insert this, and this is taken from the old bill and I believe as a matter of justice to the independent distributors and producers you must insert it in this bill: "It shall not be unlawful for any milk dealer who has been continuously engaged for the past five years in the business of purchasing and handling milk, not having an advertised and well established trade name, in a city of more than one million inhabitants to sell to stores in such city at a price not more than one cent per quart under the minimum price fixed by the board for sales to stores in such a city; and the price to be charged by stores to consumers shall be fixed by the board accordingly.

That restores the advertised and unadvertised brands of milk.

• • • • • • • •

Statement by Mr. Hugh W. Taylor
(Page 121 of Hearing)

Mr. Hugh W. Taylor: Mr. Chairman and Members of the Legislative Committees, I wish to thank you for the courtesy and the honor of appearing before you.

May I say that the purpose of my talk has something to do, not so much with what is in the bill but with what is not within the bill, and

I refer to the question of the sale of unadvertised brands of milk in New York City.

May I say for your information and for the information of your committees that the very life blood of the independent dealers of New York City depends entirely upon the continuation of that provision in last year's bill.

And may I say further that the men whom I represent are the type of men who pay the very highest salaries to their drivers and other employees. They pay the very finest and highest returns to the producers and, incidentally too, may I say that we are all interested in the producer getting a fair and large return for his money and his work.

* * * * * * * *

I am trying to be as emphatic as I possibly can in order to drive these lessons home to you and to try and tell you that the continuation of the unadvertised brands proposition as carried out under the old law is absolutely necessary and that the independent milk dealers of New York City will be completely either wiped out of existence, if you don't continue it, or that your law will absolutely have no bearing whatever, * * *.

Statement by Mr. Woodhead
(Page 125 of Hearing)

* * * and if you will remember in that year we were opposed by the Dairymen's League, Sheffield, and all the high finance milk industry.

* * * * * * * *

Statement by Mr. William J. McKay
(Page 129 of Hearing)

* * * * * * * *

MR. MCKAY: There is a great deal of misunderstanding on this matter of advertised and unadvertised brands of milk in the City of New York.

I want to say first that it is the only place that I know of in the United States where they brand an equal grade of milk as an advertised and unadvertised brand, forcing the small dealer that may not be that fortunate as to have had a business large enough to advertise his milk, to sell his milk at a reduced price for which the mother of the children in purchasing that immediately says to herself, it is an inferior article.

* * * * * * * *

Statement by Mr. William Marcus
(Page 143 of Hearing)

* * * * * * * *

Now, in the recommendations I have noticed no comment mentioned of the law of last year, which is section 317, subdivision C, which should be taken out, and that is the advertised and unadvertised price for milk. In order to go into that, gentlemen, I must tell you a little bit of the history of our milk business.

We sell to stores and to stores only. Prior to June 1, 1933, we were selling loose milk to those stores and women of New York City who cannot afford their milk to be delivered to their

boudoirs came down with pails and took this milk home.

Then too the laws of the City, of the Health Department of the City of New York, abolished loose milk because in the mind of our Commissioner Wynne, at that time loose milk was a public hazard, and they put us into the bottled milk business. So we are in and have been in the bottled milk business since June 1, 1933, which is only about eight or nine months.

Now, during that time when we sold loose milk the poor consuming public in New York City has paid for this milk four cents per quart less than the bottled milk price. If loose milk was sold in New York City for ten cents a quart the bottled milk delivered at home was 14 cents a quart. When the bottled milk came out at first we didn't get a chance to sell it. In order to introduce it to the public we gave it away and the checks that we paid to producers will easily verify that.

Then the Control Board was created and they fixed a price of bottled milk to stores and then to consumers, and you gentlemen at that time saw fit to put in that clause that the unadvertised brands should be one cent less than the advertised. Now let's follow that out. If a woman is good enough to come down every morning and pay three cents deposit on a bottle of milk, I think in my opinion she should pay two cents less. I think we have plenty of poor people in New York City who need that milk and will probably go without it if you increase the price.

Now, let's see what would happen if you look

that away from us. From experience that I have known in New York City I will quote now what happened with the Dairymen's League who extensively advertised a brand of milk for a period of years in New York City and they were selling to stores only and at a time when this Control Board sent out its first orders they found after spending millions of dollars for advertising purposes that they could not sell Dairylea milk and they substituted with an unadvertised brand in Manhattan and the Bronx, so called Biggs Dairy milk, for a cent less, and in Brooklyn Delancey milk, which shows that they haven't had a chance, or there wasn't time enough to advertise that milk to sell it to the public in New York City.

What else is going to happen? You are going to put on us the same price. The first thing we will show you that we will try to retain our business and thereby you will make criminals out of us because we will have to undersell to the storekeeper in order to push our milk. You know that the large companies in New York City, and I know some of your gentlemen who come from New York, when you talk milk all you hear is Sheffield and Borden's. The big companies spend thousands of dollars on the radio. I know I have got a little boy seven years old that listens to Uncle Don every night for a half hour, and he comes back and says to me: "Daddy, why don't they mention Municipal Farms Milk?" Because he thinks there is nothing else but Borden's. I can't afford to do that, and none of us can afford to do that, and I will tell you why we cannot afford it. • • •

Statement by Mr. Irwin Kotcher
(Page 167 of Hearing)

* * * * * * * *

Right in this man's district, this man sitting right here, 90 per cent of the milk being used is unadvertised. There is at present a 22 per cent reduction in the sale of milk in his district. I sell milk there. I have the record for it. And if we put in advertised, they can't buy it now, and we raise them another cent,—a good many more will have to stay without milk. Is that a policy to be followed right now? Is that what we are facing?

We are buying milk in New York State and we can sell it a cent cheaper. We have no hundred thousand dollars salaries. We have no inter-plant shipments that in the records show it cost about half a cent to ship from one plant. We are satisfied with what we have got and if we can handle it economically in these plants, all right. But that is nothing. They say we have no national concern with a view of what is happening in St. Louis and Mississippi and California. Our interest lies right here. We can make friends with our farmers upstate. I don't think I have any enemy upstate amongst the farmers, and I happen to be a distributor. I don't have to tell you what the distributor is to the farmer. That is human nature. But I don't believe I have an enemy. If there is one in the hall, let him say so, amongst the producers. And our company isn't doing any better then the reputable independent. We have paid 40 to 50 cents at least a hundred more than some others that sold advertised, and still

we didn't come up crying about it. We were losing money; we admit it; we had our nose on the grindstone, but are we led to infer that while we lost money the impression was cast here that others made money. If such is the case, then there should be no unadvertised milk. The farmer is paying for it, but let's look again at the record.

CHAIRMAN BYRNE: You favor the bill as it is, retaining that provision?

MR. KOTCHER: Yes, and strengthening it. We have some minor improvements, but make it as strong as possible; it is the best thing we could have had.

CHAIRMAN BYRNE: The cent differential, I mean.

MR. KOTCHER: Yes. Now, there has been an impression cast that the farmer is paying our unadvertised brand. I was on committees a half a dozen times before the Control Board with different people from the larger companies. We claimed we lost money and they claimed they lost money. The Sheffield Company, I have their brief home by their main man who handles that; the Borden Company claimed they lost money; the Dairymen's League was along with us and we were there, and we all proportionately lost money but we didn't lose any more than they did proportionately. We were all in a box. But let's not infer that we are selling that milk, unadvertised milk, at the expense of the farmer. We are ready to meet him. Put the price out regardless of what it is that is fair. We will pay it. Let all pay it, big or small, independent or cooperative, and we can

ride along and live. All that we ask is a square deal for the independent distributor. We are being legislated out of business. Last year we had the same thing. The Big Three opposed us. We had it out. We found it was equitable. It was enacted in the law. It isn't our fault.

CHAIRMAN BYRNE: And you want it to stay there?

MR. KOTCHER: We want it to stay there, and we feel we are absolutely justified in having it stay there.

There are a lot of other things I could go into but the main thing is, we are just, it is coming to us, and not for one year, as my colleague here said a moment ago. If we can go ahead and pay the price and continue paying the price, satisfying our farmers, and they are satisfied, and we can economically deliver milk in New York City at a cent cheaper, the poorest of the poor only get that milk, why shouldn't they get it and why shouldn't milk be sold to protect two or three in New York City? No, we are not philanthropists. But we can do it. We are not out to become millionaires, but we can continue in business. I have been born in it; my father was in it, and there are men in the room that were born in it and can continue in it, and we have always continued, paid our bills, and we want to pay our bills. All we ask is for a square deal.

CHAIRMAN BYRNE: And a continuance of last year's provision?

MR. KOTCHER: Yes, section—I have it here, but it has been read into the record, continued in the bill.

CHAIRMAN BYRNE: We know it. Thank you very much.

Statement by Mr. A. C. Pilger
(Page 178 of Hearing)

* * * * * * * *

In regard to this advertised brand business, we are very much interested. I believe that any farmer, if he knows his business, is going to take an interest in the consumer and the distributor as well as the producer. It is necessary to see the whole picture to form a concrete conclusion.

* * * * * * * *

Statement by Mr. Paul Balsam
(Page 196 of Hearing)

* * * * * * * *

I will at this time first refer to the statement made by independent dealers, that they wish to sell their product, which is an unadvertised product, in the City of New York at a price which is one cent below that of advertised products, and in support of that I wish to say that it is not the fact that we are charitable that compels us to do this. I will say it is because of the fact that if we are forced by the Legislature or by any Control Board to increase the price of our product so that it will net us a return which is far in excess of what the average investment should receive, that it will tend to increase the cost of our distribution in excess of one cent.

So you will have an instance of where a certain group of people willing to sell merchandise at a certain price in comparison with another group who, by reason of advertising expense and because of their capital structure must receive a larger price. You have the instance where we will be forced to increase our expense in distribution by this way.

* * * * * * * *

Statement by Mr. David Hoffer
(Page 217 of Hearing)

MR. DAVID HOFFER of New York City: Gentlemen, it looks that I represent that forgotten man, the independent grocer.

CHAIRMAN BYRNE: Good.

MR. HOFFER: That fellow wasn't represented tonight.

CHAIRMAN BYRNE: I haven't heard of him.

MR. HOFFER: I come from New York, and I think I am going to make it as brief as possible. We come in here, and where in New York we are worried on account of the bill as introduced now having gotten into what we had last year, that we have the advertised and unadvertised brands, and in New York we are worried.

CHAIRMAN BYRNE: You want it in, do you?

MR. HOFFER: We want it in because 40 or 45 per cent of our business in New York is milk and milk products, and we have today particularly with the relief food tickets, and we haven't got the unadvertised at one cent cheaper, and

therefore we are sure to lose 50 per cent of our business, and we are particularly worried.

I have been sent by my organization to see and do my utmost, if I can. We have to have in New York, particularly the independent storekeepers dealing with the poorer customer, the woman that comes down to the store to buy a bottle of milk just because she is saving two cents. If we were to be put on the level of no difference which milk, we are sure to lose 50 per cent of our business and probably 50 per cent of our business men in New York, because it is between 45 and 50 per cent of their business that is dairy. We would like to endorse in regard to this committee, to endorse the recommendation of Mr. Cooke that I heard today, to increase the membership of the Milk Control Board, but to increase it so that also these 75 to 85 thousand retail grocers in the State of New York have also a representative.

CHAIRMAN BYRNE: Yes.

MR. HOFFER: We have always been the forgotten men wherever it came. We have given full 100 per cent cooperation and in New York City we have given 100 per cent cooperation to the Milk Control Board. We are always giving our cooperation. I see no reason, or it looks to me as unjust when they forgot the retail grocer in New York City with 30 or 35 thousand dealers. They are selling all that. The farmer is claiming and all that the independent dealer is claiming, we are selling direct to the woman the milk, and at all times we are forgotten. New York is for, and I can say 100 per cent for, having two prices on milk, one cent

cheaper for the lady that has a food ticket, or if she hasn't got a food ticket she comes down from upstairs and is willing to save two cents on a bottle of milk.

CHAIRMAN BYRNE: You really like the Control Board idea, do you?

MR. HOFFER: Yes, sir.

* * * * * * * *

Statement by Mr. Bert Thompson
(Page 221 of Hearing)

* * * * * * * *

MR. THOMPSON: We had a good market until the damned cursed Dairymen's League undersold us in New York and took it from me.

* * * * * * * *